SUPREME COURT, U. S.
NOV 19 1974
MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-65

DAVID WILLIAM CLINGON,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *David William Clingon* v. *State of Mississippi*, 293 So.2d 823 (Miss. 1974). Rehearing denied May 20, 1974. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C., Section 1257(3). Jurisdiction is improperly invoked under said authority as is hereinafter set forth in Respondent's argument.

QUESTIONS PRESENTED

As hereinabove set forth, the constitutional issue presented is not properly before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment XIV, Section 1. However, as hereinafter set forth, the question raised is not properly before this Court.

STATEMENT OF THE CASE

The Petitioner was indicted for murder and was convicted in the Circuit Court of Rankin County, Mississippi, of manslaughter. The Supreme Court of the State of Mississippi affirmed the conclusions and findings of the Lower Court.

During the process of impanelling the Jury, and at a point in time when the State was required to tender to

defendant a full panel of jurors, the District Attorney and the County Attorney withdrew from the courtroom to make final decisions prior to tender of the panel and at the same time the sheriff departed the courtroom. The departure of the three officials was in plain and unobstructed view of the prospective jurors. Counsel for defendant, Petitioner herein, promptly entered a motion to quash the special venire because the District Attorney, County Attorney and the sheriff departed the courtroom simultaneously and the sheriff was to be and he did testify as a material witness on the trial of the case. Such conduct was alleged to be highly prejudicial to Petitioner.

An evidentiary hearing was held on the motion to quash without the presence of the jury, and the trial judge found that error, if any committed, was harmless error and the motion was overruled. The evidence presented and findings and rulings of the trial judge on this motion appear in the Appendix as B. During the course of the trial, the sheriff was called and he did testify as to the guilt of Petitioner, without any further objections from Counsel for Petitioner.

At the conclusion of the trial and after sentence had been imposed, a Motion for New Trial was filed but Petitioner did not complain further of the actions of the Trial Judge in overruling his Motion to Quash the Special Venire (See Appendix B), nor of any error in the denial of due process in violation of the Constitution of the United States, Amendment XIV, Section 1. A true copy of the Motion for New Trial appears in the Appendix as C.

Feeling aggrieved with the judgment of the Lower Court, Petitioner perfected an appeal to the Supreme Court of Mississippi, and in compliance with Mississippi Supreme Court Rule 6 (Appendix D), adopted December 20, 1967,

prepared and filed Assignments of Error (a true copy of which appears in Appendix as E); prepared and filed Brief for Appellant as required by Mississippi Supreme Court Rule 7 (Appendix F); and, in due time argued his cause according to Mississippi Supreme Court Rule 10 (Appendix G). There was no error assigned, nor was there any argument made to invite the attention of the Supreme Court of Mississippi to any alleged denial of due process of law, or to ask the Supreme Court of Mississippi to review the actions of the Lower Court in denying the Motion to Quash the Special Venire (Appendix B).

After the Motion to Quash the Special Venire was made, the evidentiary hearing was held thereon, and the findings and rulings of the Lower Court were entered (Appendix B), the Petitioner made no further complaints or objections in the trial court, or on appeal to the Mississippi Supreme Court, concerning the federal constitutional issue here relied upon, and the Mississippi Supreme Court's opinion did not rely upon federal or state constitutional grounds in affirming the conviction (Appendix A).

ARGUMENT

It is well established that this Court will not decide federal constitutional issues raised here for the first time. *Cardinale* v. *Louisiana,* 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

It is well established that it will be assumed that where the highest state court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state courts, and the burden of showing otherwise is on the aggrieved party. *Street* v. *New York,* 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

It is the position of the State of Mississippi that Petitioner's sole federal question presented by his petition was raised in the trial court by his Motion to Quash the Special Venire and that facts were presented at the evidentiary hearing to show that his motion was not well taken and should be and it was overruled (Appendix B). The record reflects, without dispute, that the question raised by the Motion to Quash and set out in the petition herein, was not further raised, presented or argued in the trial court or the Mississippi Supreme Court (Appendix C and E). Thus, the sole federal question herein raised was not preserved and presented to the Mississippi Supreme Court, and the Mississippi Supreme Court did not, and could not, consider and pass upon the federal question because it had not been preserved and presented to the Court. *Colson* v. *Sims*, 220 So.2d 345, 346 (Miss. 1969).

In *Browning* v. *Shackelford*, 196 So.2d 365, 373 (Miss. 1967), the Court stated:

> Rule 6 of this Court deals particularly with "plain errors" and does not require or permit us to adopt a neo-advisory position and suggest to litigants other potential offenses or defenses. It is the immutable obligation of a court to sit, and to sit only, as an objective and indifferent arbiter of the rights of the litigants. This Court has been meticulous in striving to fulfill this austere duty.

In the absence of a showing to the contrary, it must be assumed that the failure of the Mississippi Supreme Court to pass upon the federal question here presented was because it was not preserved and presented to the State Supreme Court. Since it was not preserved and presented to the Mississippi Supreme Court, this Court should not consider the federal question now before it.

Further, the State of Mississippi does not believe the facts of record (Appendix B) support that material part of the question presented, i.e., "where the sheriff was with the District Attorney and assisting the District Attorney in passing upon the jurors called, *in plain view of the Jury,*" (emphasis added), which factual situation is necessary to bring the question into the rule of law relied upon by Petitioner and within the provisions of *Yelverton* v. *State,* 191 So.2d 393 (Miss. 1966). Too, the State of Mississippi would respectfully submit that the factual situation existing as reflected by Appendix B removes this case completely from the rule, and the valid reasons for the rule, as announced in *Wayne Turner* v. *The State of Louisiana,* 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1964). In the instant case, the factual situation reflects that the sheriff, the District Attorney and the County Attorney, all officers of the court, departed the courtroom at or about the same time; that after they had cleared the courtroom the sheriff went his separate ways to arrange for bailiffs to attend the jury in response to directions from the court. Since the sheriff was to be, and did appear as, a witness, it was necessary and proper that he obtain and assign others to the duties of bailiff. In the case of *Turner,* the contrary was true. Simmons and Rispone were not only key witnesses, they were deputy sheriffs and were assigned the additional duties of bailiffs during the entire period of the three day trial. They were responsible for the needs and comforts of the entire jury. In the instant case, the sheriff was not in attendance to the needs of the jury, that being assigned to bailiffs who were not witnesses. Thus, a totally different relationship was created and existed.

CONCLUSION

Therefore, for the reasons set out above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER, Attorney General

By: BEN H. WALLEY
Assistant Attorney General
Of Counsel

CERTIFICATE

I, Ben H. Walley, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief in Opposition to Edward L. Cates, Attorney at Law, P. O. Box 2005, Jackson, Mississippi 39205.

This the 18th day of November, 1974.

BEN. H. WALLEY
Assistant Attorney General

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 47,902

DAVID WILLIAM CLINGON

v.

STATE OF MISSISSIPPI

GILLESPIE, CHIEF JUSTICE:

David William Clingon was indicted in the Circuit Court of Rankin County for the murder of Fred Leon Browning and convicted of manslaughter. He prosecutes this appeal, and the principal question raised is whether he was entitled to a peremptory instruction.

Defendant argues that he was entitled to a peremptory instruction under the rule announced in *Weathersby* v. *State,* 165 Miss. 207, 147 So. 481 (1933), which is as follows:

> It has been for some time the established rule in this state that where the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge. 165 Miss. at 209, 147 So. at 482.

The deceased lived with his family in a trailer home in Rankin County. On the afternoon of the homicide,

defendant stopped by the Browning home, and he and Browning left to purchase some alcohol. Later they both returned with two bottles of whiskey. An argument developed between defendant and Browning, and Mrs. Browning and her daughter left. Thereafter defendant drove to the home of J. T. Varner and requested Varner to take him to the sheriff's office so that one of the deputies could take him to a doctor. Clingon gave Mrs. Varner a 38-caliber pistol which contained three rounds of live ammunition and three empty hulls. Clingon stated that he had been shot, although his wounds consisted only of deep scratches on his stomach. There were holes in each side of his zipper jacket and one hole in his shirt. Defendant then went to the jail and thence to the hospital where a nurse bandaged his wounds.

During the investigation that followed, the body of Browning was found in his bedroom which is at the end of a hall. Immediately in front of the bedroom entrance are a bathroom on the left side of the hall and a back door to the trailer on the right side. The hall is two feet wide. Browning was lying face down with his head toward the rear of the trailer. Near the doorway was a shotgun pointed toward the hallway with a spent shell in the barrel. A live shotgun shell was on the floor nearby. On the side of the hall opposite and down from the bathroom door was a hole in the wall made by the pellets from a shotgun, and in this hole were fragments of cloth, presumably part of defendant's zipper jacket. Two spent 38-caliber bullets were found in the bedroom, and another was lodged in the bedroom wall.

Browning had been shot three times, and there were powder burns around the two wounds on his chest. The first bullet entered in the buttock below the hip line, traversed through the soft tissue of the buttock, and exited

to the left of the mid line still in soft tissue. The angle was toward the center of the body and down. The second wound, which was probably the fatal wound, went through the heart and the lung before it exited. The angle was almost a straight shot perpendicular to the vertical position of the body. The maximum time that a person could live after sustaining that wound would be fifteen to thirty seconds. The third missile entered the right side of the chest and exited below the rib cage on the left side. This wound was at a downward angle and would also have been fatal if he had not received almost immediate attention. Browning was essentially dead when this third wound passed through his body.

The pathologist determined that the shot in the hip was the first by reason of the fact that the blood had been pumped out from the missile track, indicating the heart was pumping blood at the time the wound was inflicted. The pathologist's opinion as to the sequence of the three shots was based on the amount of bleeding related to the track of the missiles and the fact that the heart did not pump after it was penetrated by a bullet. The shot entering the right side of his chest caused a minimal amount of hemorrhage along the missile track, indicating that the heart was not pumping when that shot was fired.

DEFENDANT'S VERSION

Defendant testified that before going to the Browning residence he went by a pawn shop in Jackson, picked up his pistol and then went to look at a lot located near Browning's trailer that he was interested in buying. As he passed Browning's trailer, Browning stopped him and asked where his drinking whiskey was, and defendant replied that he did not have any whiskey. Browning

asked defendant to take him to Jackson so that he could buy some. Since neither Browning nor his wife had enough money to buy the alcohol, defendant loaned Browning ten dollars. Browning and defendant bought whiskey in Jackson and then returned to the Browning trailer. Browning insisted that defendant go in, and defendant agreed, saying he could not stay very long. The two men went inside and sat down at the dining room table as Mrs. Browning gave them glasses and Coca-Colas which they used to pour themselves each a drink.

While Mrs. Browning watched television, Mr. Browning attempted to engage defendant in an argument by accusing him of being responsible for his being fired. Defendant denied the accusation and told Browning that he would have to leave. Browning then quit arguing and told defendant to sit down, but he soon resumed the argument. Defendant asked Mrs. Browning whether she had explained to Mr. Browning that defendant had had nothing to do with his being fired, and she replied that she had but her husband was hardheaded. Browning then told his wife to shut up and stay out of it, and Mrs. Browning left.

Defendant then asked Mr. Browning if he could use his bathroom. Browning pointed the way and then followed him. When defendant came out of the bathroom, Browning, standing to defendant's left in the bedroom, said, "Clingon, I am going to kill you." Defendant replied, "No, no, Browning." Browning fired a shotgun, and the blast knocked defendant down against the outside wall which was across from the bathroom. As Clingon started to get up, Browning was still pointing the shotgun at him, and Clingon pulled his gun out of his coat and started firing, because he thought his life was in danger. He fired rapidly three times while the shotgun held by Brown-

ing was about three feet from his body. Browning was in a standing position when defendant fired at him, and he thought Browning reeled a little after he shot him, although he did not know whether he hit him. The holes in defendant's shirt and jacket where caused by the shotgun blast. He did not shoot Browning when Browning was down.

Defendant denied he had threatened to kill Browning prior to the shooting. He denied that Browning's daughter was in the trailer while he and Browning were arguing. He denied that he was drunk and that Browning had told him to leave. Defendant also denied that he asked the deputy sheriff at the jail, "Are you bastards going to take me to the hospital?" He denied having told the nurse to get up on the stretcher with him.

THE CONTRADICTIONS

The *Weathersby* rule is unavailable if defendant's version is unreasonable, or substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts, or facts of common knowledge. The defendant's version is contradicted in the following respects:

1. The wife of deceased testified that when the defendant asked her husband to go with him to get some whiskey, Browning refused, but defendant insisted until he agreed. It was defendant, not Browning, who started the argument. Defendant became intoxicated, and Browning asked him to leave. Defendant insisted that Browning admit that he remembered something they were arguing about, and Browning insisted that he did not remember. Whereupon defendant told Browning, "Don't say that you don't remember, or I might kill you."

2. The daughter of the deceased stated that the defendant persisted in needling Browning and that when defendant got up from the table where he and Browning had been drinking, he staggered, had trouble speaking, and in her opinion was drunk.

3. J. B. Torrence, Sheriff of Rankin County, testified that when he saw the defendant at his office the defendant was drunk. Two days after the shooting, defendant told Torrence that he hated that he had to kill the man but that Browning was standing at the dining room table reaching for his gun when he shot him.

4. Jack Smith, an investigator for the Highway Patrol, stated that when defendant came to the Rankin County Jail he said, "Are you bastards going to carry me to a doctor or hospital?" The defendant was intoxicated at that time. Two days after the incident, defendant told Smith that he hated to shoot the man after he was down but that he was attempting to load the shotgun when defendant shot him. Defendant told Smith that he and Browning were sitting at the table in the dining room, which is at the opposite end of the trailer from the bedroom. When defendant got up to go to the bathroom and when he emerged from the bathroom, Browning was still at the dining room table and fired the shotgun at him.

5. A. B. Martin, a deputy sheriff of Rankin County, testified that when defendant came to the jail after the shooting, he was drunk.

6. Ken Dickerson, a deputy sheriff of Rankin County, testified that when he saw defendant after the shooting, the defendant was drunk. After defendant went to the hospital, defendant told him that he hated to shoot the man while he was down but that Browning was trying to reload the gun.

7. Kenneth Warren, deputy sheriff of Rankin County, testified that while at the hospital following the shooting, defendant said, "I hated to shoot him while he was down, but he kept trying to get up and reload the gun."

8. Mrs. Margaret Ainsworth, a registered nurse at the Rankin General Hospital, who was on duty when Clingon was brought to the emergency room, testified that defendant was in an intoxicated condition and asked her if she would like to climb upon the stretcher with him. She stated that defendant said that he hated to shoot the man when he was down, but that he had gone for his gun.

The foregoing contradictions involved material particulars and were made by credible witnesses for the State.

Defendant went to the home of deceased armed with a loaded pistol. The jury was justified in finding that he became drunk and precipitated the argument with the deceased; that he gave three different versions of the shooting: (1) that Browning was in the dining room when Browning shot at him with the shotgun (obviously not true from the physical facts), (2) that he shot Browning when Browning was down, and (3) that he shot Browning when Browning was standing in the bedroom. Considering all of the evidence, including the contradictions noted herein, we hold that the *Weathersby* rule is not available to the defendant in this case and that the question of his guilt was for the jury. Cowart v. State, 270 So.2d 350 (Miss. 1972).

Defendant assigns as error the giving on behalf of the state of instruction No. 6, which is similar to the one given in *Patterson* v. *State*, 289 So.2d 685 (Miss. 1974). This instruction is concerned with malice aforethought, which is an element of murder but not of manslaughter. Defendant was not convicted of murder, and, therefore,

the giving of the instruction is not reversible error insofar as the question of malice aforethought is concerned. The instruction in question does not have the vices that resulted in the reversal of *Nicholson* v. *State,* 243 So.2d 552 (Miss. 1971), because in *Nicholson* the state's instruction was focused on the plea of self-defense. The instruction in the case at bar uses the phrase "and not in necessary self-defense, real or apparent," not in a manner to advise the jury concerning that defense, but merely to avoid cutting off that defense. The defendant received ample instructions setting out his claim to self-defense, perhaps considerably more liberal than he was entitled to under the law. Therefore, we find no reversible error in the giving of state's instruction No. 6.

The next question raised is the contention that the verdict is contrary to the law and the evidence. The thrust of defendant's argument is that he acted in necessary self-defense, and that there is no evidence to the contrary. This is discussed in the first question raised, and we find no merit in this assignment of error.

Finally, defendant says that the trial court erred in allowing the state to introduce pictures depicting the body of the deceased, because such pictures served no other purpose than to prejudice and inflame the jury. The pictures show the location of the wounds in a manner that would be difficult to describe orally. We are of the opinion that these photographs served a useful evidentiary purpose in this case. Moreover, the introduction of such evidence is within the sound discretion of the trial judge. Ford v. State, 227 So.2d 454 (Miss. 1969).

AFFIRMED.

PATTERSON, INZER, SUGG AND BROOM, JJ., CONCUR.

APPENDIX "B"

(R, Vol. I, pp. 17-23)

BY MR. BARNETT: Comes the defendant and moves the Court to suppress any evidence that Mrs. Browning, widow of the deceased, went to the home of Mr. Clingon before the shooting took place and that this evidence has no relevancy whatsoever with reference to the case of murder. In the other trial, testimony was admitted that Mrs. Browning went to the home of Mr. Clingon and advised Mrs. Clingon that Clingon and Browning were drinking and that she was afraid trouble would result from an argument going on between Clingon and Browning. We respectfully move the Court to suppress any evidence to the effect that Mrs. Browning went to the home and made such a report; that it would be highly prejudicial to the defendant.

BY THE COURT: I will rule on that later.

The Judge sent for the Sheriff, and upon his arrival in chambers, all counsel and the defendant still present, the following proceedings were had and done:

BY THE COURT:

Q. Mr. Sheriff, a while ago when you left the courtroom prior to the selection of the jury, tell me how you came out of the courtroom.

A. I don't know. I believe that Jim came out first, maybe me second, Bill third, I might have been last, I am not sure.

Q. Did you come out at the same time, Mr. Sheriff?

A. I think so, both at the same time.

Q. Did the District Attorney motion you to come out or did you just get up and walk out?

A. No sir, I just got up and walked out.

BY THE COURT:

Q. Mr. Cunningham, you want to ask any questions?

BY MR. CUNNINGHAM:

Q. Sheriff, did you confer with Mr. Herring when you came out?

A. Yes sir, we talked.

Q. I know you had a piece of paper, as a matter of fact, did you confer with him about any of the jurors?

A. I was looking over testimony I had given last time, that's what I was doing.

Q. How close together were you three men when you left the courtroom and went in the ante-room?

A. I came outside, Jim and them went down stairs. I came on in here to use the telephone to get up some bailiffs.

Q. Did you have any conversation with Mr. Herring about members of the jury?

A. I went on down stairs after I got off the telephone, they were back there discussing jurors. About the time I got in there they left, Bill and District Attorney, came back up stairs.

Q. When you went back in the jury room, isn't it a fact you and Mr. Herring and the county Attorney came back in together?

A. No sir, I believe I came back in first. I was back up stairs before I knew they had come back up.

Q. You did discuss the jury list?

A. We did discuss the jury on—

Q. You did leave the courtroom pretty close together?

A. We left the courtroom pretty close together.

Q. As a matter of fact you three men went into the ante-room before the door was ever closed, did you not?

A. I came out of the courtroom and came in here to use the telephone. Jim and them went down stairs. When I got down stairs they were talking. About the time I got there they were called back upstairs. Somebody said the Judge sent for them.

Q. Where were you when you discussed the jury list? A. We discussed the jury list some time after we got the jury list.

Q. I mean this morning?

A. When the twelve jurors were called and the twelve jurors were in the box.

Q. And you and Mr. Herring and the County Attorney left the courtroom at the end of Mr. Herring's voir dire?

A. They were discussing the jury down there when I got in the room.

Q. That is what I had reference to.

A. They were called out and just almost immediately after I got down there they left and came back upstairs.

BY MR. CUNNINGHAM: That is what we propose to show, that it all occurred in the presence of the jury and the prospective jurors. We know you have the right of the District Attorney to confer with the sheriff but the actions of the three gentlemen was noticeable in open court.

BY MR. HERRING:

Q. Sheriff, do you know where the County Attorney and I made our selection? Was it in the ante-room in here?

A. I suppose you made it down stairs. I don't know, may have been in the ante-room.

BY MR. CUNNINGHAM:

Q. Let me ask you one more question. Did you give your opinion to the District Attorney or County Attorney concerning any jurors that had been drawn?

A. I didn't today. We did not talk before they left the courtroom to go down stairs.

Q. When you left did you intend to cooperate with the District Attorney?

A. I feel if he needed my cooperation, I certainly did.

BY THE COURT: Got any further questions, Mr. Herring:

BY MR. HERRING: No sir, nothing further.

BY THE COURT: Anything further Mr. Cunningham?

BY MR. CUNNINGHAM: I would like to call Dan Martin, Your Honor.

BY THE COURT: Since Mr. Martin is an officer of the Court, oath will be waived.

Oath being waived, Mr. Martin testified as follows:

BY MR. CUNNINGHAM:

Q. Mr. Martin, were you present in court this morning when, during the selection of the jury when Mr. Herring conducted the voir dire examination?

A. Yes sir.

Q. Were you present when the State had ended the voir dire examination?

A. I was.

Q. I will ask you if you noticed Mr. Herring today in the courtroom?

A. I did.

Q. Tell the Court, if you will, what you noticed at the time Mr. Herring left.

A. At the time Mr. Herring left the only time I noticed, the sheriff was sitting there. After Mr. Herring and Mr. Bridges left the room, Mr. Torrence was also gone. I do not know in what order, but I do know they left approximately the same small period of time which would indicate they left at about the same time.

Q. Did you notice the District Attorney motion to the sheriff to come into the ante-room?

A. I noticed the District Attorney look back into the courtroom.

Q. Did this occur in the presence of the open court in the presence of the jurors in the box as well as in the rest of the court?

A. Yes sir.

Q. Did they close the door to the ante-room?

A. Not until all three gentlemen were absent from the courtroom.

Q. I will ask you if you noticed when Sheriff Torrence returned to the courtroom?

A. At the time I did not notice, no.

BY MR. CUNNINGHAM: That's all.

BY THE COURT: Mr. Herring, you have any questions?

BY MR. HERRING: No sir.

BY THE COURT: Anybody else you want to call Mr. Cunningham?

BY MR. CUNNINGHAM: No sir.

BY MR. HERRING: Your Honor, I will call Mr. Bridges.

Mr. Bridges was called and being an officer of the Court, oath was waived and he testified as follows:

BY MR. HERRING:

Q. You are Billy Bridges, County Attorney?

A. I am.

Q. Mr. Bridges I believe you were in the courtroom at the time the voir dire took place, were you not?

A. That's right, I was.

Q. Do you have any recollection as to who left the courtroom first after the voir dire took place?

A. I left the courtroom first.

Q. Do you know who left second?

A. I think Mr. Torrence left second. I am not sure about that, but he was behind me.

Q. All right, where did you proceed to?

A. Went from there down to Philip Warren's office, the Circuit Clerk's office. I was alone when I went there.

BY MR. HERRING: No further questions.

BY MR. CUNNINGHAM:

Q. Mr. Bridges, Mr. Herring left the courtroom too, did he not?

A. He did, he was behind me.

Q. Isn't it true you three men were one behind the other when you left?

A. Mr. Herring was behind me, I didn't look to see who was behind him. I went in Philip Warren's office first.

Q. Did you see the sheriff down there?

A. The sheriff was talking with a man at the head of the stairs and talked with him at some time before he came in the clerks office.

Q. Did you three gentlemen follow the same route down to the clerks office?

A. I don't know that because I came alone.

BY MR. CUNNINGHAM: No further questions.

BY THE COURT: It is the opinion of the Court that the sheriff and County Attorney and District Attorney came out at about the same time, if not at the same time, but the Court knows that of its own knowledge that during the time the County Attorney and District Attorney were conferring the Court had the sheriff in its office instructing him to get some bailiffs at some point this morning. Now it is unquestionable but that the District Attorney can confer with the sheriff or any other person regarding the selection of a jury but I want

to correct something. I had the sheriff in my office prior to that time in when they went out to select the jury. The Court is of the opinion that while it may be improper for the sheriff to have walked out at the same time as the District Attorney and County Attorney, that error, if any committed, is harmless error and the motion is overruled.

On the motion to suppress evidence concerning Mrs. Browning's trip to the Clingon home, the ruling of the Court is going to be that she can testify as to where she went but not as to what she said when she got there. She can testify she left the trailer and went over wherever it was she went and got Mrs. Clingon or whoever she got and came back.

On the motion to suppress evidence regarding the broken window in the trailer, I am going to overrule the motion.

APPENDIX "C"

(R, Vol. III, pp. 399-400)

IN THE
CIRCUIT COURT OF RANKIN COUNTY,
MISSISSIPPI

JULY 1973 TERM

NO. 9859

STATE OF MISSISSIPPI

VS.

DAVID W. CLINGON
DEFENDANT

MOTION FOR NEW TRIAL

(Filed July 27, 1973)

Comes now David W. Clingon, defendant in the above styled and numbered cause, and through his attorneys of record moves the Court to set aside the verdict and judgment rendered in this cause and in support thereof would show unto the Court the following facts and matters:

1.

The Court erred in refusing to grant defendant's peremptory instruction at the close of all of the evidence and after both sides had rested.

2.

The verdict is contrary to the overwhelming weight of the evidence.

3.

The verdict is contrary to the overwhelming weight of the law.

4.

The Court erred in granting instructions requested by the State and which objections thereto were entered of record.

5.

The Court erred in sustaining all objections made by the State to testimony offered by the defendant.

And for other causes to be shown on a hearing hereof.

Respectfully submitted,

David W. Clingon, Defendant
Barnett, Montgomery, McClintock & Cunningham
315 Barnett Building
Jackson, Mississippi
By /s/ E. H. Cunningham, Jr.
Attorneys for Defendant

APPENDIX "D"

(Miss. Sup. Ct. Rule 6)

Rule 6

ASSIGNMENTS OF ERROR

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (a). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

APPENDIX "E"

(Brief of Appellant)

IN THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 47,902

DAVID W. CLINGON, JR.
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

ASSIGNMENT OF ERRORS

Now comes the Appellant, by his attorneys, and assign as errors by the lower court, the following

1. That the trial court should have granted the Appellant's request for an instruction directing the jury to find the defendant not guilty (R. 397) and that the court committed reversible error in refusing said instruction. (R. 399).

2. The verdict is contrary to the law and evidence. (R. 399).

3. The trial court erred in granting Instruction No. 6 to the State. (R. 379).

4. The trial court erred in allowing the State, over objections of Appellant, to introduce pictures depicting

the body of the deceased, as such pictures were calculated to prejudice and inflame the jury. (R. 137, 139, 140).

Respectfully submitted,

David W. Clingon
Barnett, Montgomery, McClintock & Cunningham
315 Barnett Building
Jackson, Mississippi
Attorneys for Appellant
By: /s/ E. H. Cunningham, Jr.
Of Counsel

CERTIFICATE

I, E. H. Cunningham, Jr., of Counsel for Appellant, hereby certify that I have this date personally delivered a true copy of the foregoing Assignment of Errors to Honorable A. F. Summer, Attorney General.

This, the 30th day of November, 1973.

/s/ E. H. Cunningham, Jr.

APPENDIX "F"

(Miss. Sup. Ct. Rule 7)

Rule 7

BRIEFS

(a) Immediately upon receipt of the record, and for the convenience of attorneys, the Clerk shall notify counsel of the filing of the record and the due date of briefs in accordance with this rule. However, failure of the clerk to give or of a party to receive notice of the filing of the record shall not excuse any delay in filing briefs.

Appellant's brief shall be filed not later than forty (40) days after the date the record is filed in the office of the Clerk of this Court.

Appellee's brief shall be filed not later than sixty (60) days from the date the record is filed in this Court, and any rebuttal brief of appellant shall be filed not later than seventy (70) days after the record is filed herein. An original and five copies of all briefs shall be filed with the Clerk. The certificates of appeal required in criminal cases under Mississippi Code 1942 Annotated sections 1182-1184 (1956) shall not affect the due dates of briefs in all cases, civil and criminal, which shall be as stated above.

Each case shall be considered at issue after the due date for filing of briefs has expired, and is thereafter subject to being set for oral argument and submission at any time in the discretion of the Court in accordance with Rule 9.

If the appellant fails to file his brief within the time herein required, his case shall be dismissed on motion

of appellee or on the Court's motion; and any case so dismissed shall not be reinstated except as provided by Rule 18. If the appellee fails to file his brief within the time herein required, such brief shall be stricken from the record on motion of appellant or on the Court's motion. For the purpose of enforcing the foregoing, the Clerk shall advise the Court of any delinquency in filing briefs.

(b) The contents of briefs are for the determination of counsel, but those briefs are of most assistance to the Court in which there precedes the argument of counsel: First, a concise statement of the case so far as essential to an understanding of the questions presented for determination with specific references to the precise places in the record where the points discussed may be found; and, second, a "brief of the argument," which should consist of the points or propositions of law, or fact, to be discussed with the citation of authorities relied upon in their support.

(c) Appellant's original and rebuttal briefs together shall not exceed fifty (50) pages, and appellee's brief shall not exceed fifty (50) pages. They shall be typewritten or printed; and if typewritten, shall be in black non-copying ink, double-spaced (exclusive of quotations and footnotes), on white paper, without the name of any person or advertising matter thereon. There shall be appended thereto a certificate that a copy of it has been delivered or mailed to opposing counsel; and if mailed, the certificate to appellant's original brief must contain the further statement that it was done not later than two days before the filing thereof. Every brief shall be distinctly and plainly printed, or typewritten, and if typewritten, on paper not exceeding eight and one-half inches in width and not exceeding fourteen inches in length, on one side of every page; and each page shall be num-

bered at the bottom, at or near the center, and there shall be a blank margin at the top of not less than one and one-half inches and at the bottom of not less than one inch, a margin on the right side of not less than one-half inch, and a blank margin on the left side of not less than one and one-half inches. The type shall not be smaller than pica. Subject to other requirements of these rules, briefs may be reproduced also by offset printing, positive photocopy, or mimeograph process, or by any substantially similar method, provided the product is clear, easily readable, and without glare.

(d) Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.

(e) If oral argument is desired by either party, he shall give notice thereof on the cover or front page of his brief by stating thereon, "Oral Argument Requested." Such request may be withdrawn by written or oral notice to the Clerk of the Court and opposing counsel.

(f) The appealing party in all direct appeals and cross-appeals shall file a brief statement not exceeding two pages, setting forth the nature and purpose of the case, the action of the trial court thereon and the points raised on appeal. The opposing party may file a similar statement. All such statements, the original and five copies thereof, shall be filed at the time of the filing of the briefs. This brief statement shall be separate from the brief and shall not be physically attached to or included in the brief. It shall contain a certificate that a copy thereof has been delivered or mailed to opposing counsel.

(g) The front cover of every brief shall show the style and number of the case and shall designate the brief

as "BRIEF FOR APPELLANT," "BRIEF FOR APPELLEE," or "APPELLANT'S REBUTTAL BRIEF." Each brief shall contain a topic or subject index identifying clearly by a sentence or concise statement the separate points to be urged before the Court. The points so identified shall be numbered consecutively, and under each point shall be an alphabetical list of the cases, statutes, textbooks, and other authorities or materials which the brief maker is relying upon in support of that point, showing the page or pages of the brief where that case or other authority is mentioned. In addition to the above, there shall be a separate alphabetical table of all cases and other authorities cited in the brief with a reference to each page of the brief where the authority is mentioned. All Mississippi cases shall be cited to both the official Mississippi Reports and the Southern Reporter. Quotations from cases and authorities appearing in the text of the brief shall be followed by a reference to the book and page(s) where the quotation appears.

APPENDIX "G"

(Miss. Sup. Ct. Rule 10)

Rule 10

ARGUMENT OF COUNSEL

In the event oral argument is requested under Rule 7(e), only two counsel will be heard for each party on the argument of a case. The time allowed therefor will be determined by the Court in each case and may be apportioned between the counsel on the same side in their discretion, provided always that a fair opening of the case shall be made by the party having the opening and closing argument.